Supreme Court, U.S.
FILED
MAR 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1266

In the Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE A. ZIMMERMAN AND RICHARD ZIMMERMAN,
PETITIONERS

v.

JAMES C. HANDLEY, ADMINISTRATOR,
AGRICULTURAL MARKETING SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that substantial evidence supported an administrative sanction imposed under the Perishable Agricultural Commodities Act on the ground that petitioners were "responsibly connected" with a licensee that had violated the Act.

1. a. Petitioners were members of the board of directors of Yankee Brokerage, Inc., a commodities broker formerly licensed under the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*[1] In 1981, Yankee Brokerage failed to make payments totalling almost $1 million on its purchases of over 300 lots of fresh produce. Following issuance

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[1]Petitioner Clyde A. Zimmerman also was the treasurer and executive vice-president of the firm. Pet. Supp. App. SA2.

of an administrative complaint against Yankee Brokerage, the corporation was found to have "committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b)," which prescribes standards of conduct for licensees. *Yankee Brokerage, Inc.*, 42 Agric. Dec. 576, 577 (1982). See Pet. Supp. App. SA1-SA2, SA13-SA14.

The Agricultural Marketing Service then instituted disciplinary proceedings against petitioners, charging that they were "responsibly connected" with Yankee Brokerage under the terms of the Act and therefore temporarily barred from employment with any licensee except with the approval of the Secretary of Agriculture. See 7 U.S.C. 499h(b). Under the Act, "responsibly connected" is defined to mean, inter alia, "affiliated or connected with" a licensee as a corporate "officer [or] director." 7 U.S.C. 499a(9). Petitioners were afforded evidentiary hearings at which they were given the opportunity to demonstrate that, despite their positions as directors of Yankee Brokerage, they did not, in fact, possess any real authority within the corporation.

At their administrative hearings, petitioners attempted to show that Yankee Brokerage was in substance operated as a sole proprietorship by their father, Roy Zimmerman, and that their membership on the firm's board of directors did not give them any actual authority over its operations. After carefully reviewing petitioners' evidence, the presiding officer rejected their claims. Pet. Supp. App. SA1-SA12, SA13-SA22. The presiding officer concluded that petitioners worked closely with their father and that he could not "envision Roy Zimmerman working in a total vacuum making all of the business and management decisions devoid of any input from the other corporate officers and directors." *Id.* at SA11. He also noted that petitioners, as directors of the corporation, took numerous "substantive actions on behalf of Yankee," and that, even in their role as

salesmen, they had significant "latitude * * * in making business decisions on behalf of the firm." *Id.* at SA10. The presiding officer found in addition that petitioners were "content to remain" on the board of directors for several years, choosing to resign "only after the firm encountered financial problems" and they "learned of the implications of that relationship." *Id.* at SA11, SA21. He concluded that it was "inconceivable that [p]etitioner [Clyde A. Zimmerman] was nothing more than a figurehead" (*id.* at SA10) and that petitioner Richard Zimmerman "failed to sustain [his] burden" of showing "that he was a nominal director with no power in management and operation of the firm" (*id.* at SA22, SA19). The presiding officer therefore decided that petitioners were responsibly connected with Yankee Brokerage within the meaning of the Act.

b. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-2a. Relying on its decision in *Pupillo* v. *United States*, 755 F.2d 638 (8th Cir. 1985), the court of appeals concluded that the agency's orders were "supported by substantial evidence on the record as a whole, [and] that no error of law appear[ed]." Pet. App. 2a.

2. Petitioners contend (Pet. 4-12) that the court of appeals conclusively presumed that they were responsibly connected with Yankee Brokerage on the basis of their positions as directors of the corporation and that this decision conflicts with two decisions of the District of Columbia Circuit, which construe the Act to create only a rebuttable presumption that corporate officers and directors are responsibly connected to their brokerage firms. Although we agree that there is a conflict among the circuits with respect to the interpretation of 7 U.S.C. 499a(9),[2] that

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[2]Compare *Minotto* v. *United States Dep't of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983) (rebuttable presumption); *Quinn* v. *Butz*, 510 F.2d 743 (D.C. Cir. 1975) (same), with *Pupillo* v. *United States*, *supra* (automatic disqualification) (alternative holding); *Zwick* v. *Freeman*,

conflict has no bearing on the resolution of this case. The agency gave petitioners the benefit of the rebuttable presumption and decided as a factual matter that they had failed to carry their burden of proof. The court of appeals' brief decision also appears to rest on the alternative ground that petitioners did not rebut any presumption raised by the Act: the decision refers to "substantial evidence" supporting the agency's orders, and the case on which it relies, *Pupillo* v. *United States, supra*, expressly held, as an alternative to automatic disqualification, that the corporate officer there had failed to carry his burden of proof under the District of Columbia Circuit's rebuttable presumption approach. 755 F.2d at 644-645. Since petitioners did not prevail even under the more generous view of the Act, this case would not be an appropriate one in which resolve the conflict over its interpretation.

a. In *Quinn* v. *Butz*, 510 F.2d 743 (D.C. Cir. 1975), the court held that the Act's definition of "responsibly connected" in terms of positions such as corporate officer and director raises only a prima facie presumption that a person within the definition did in fact possess authority over the firm and that such a person has "the burden of proving, but also the prerogative of attempting to prove," that he was without "personal fault or a realistic capacity to counteract or obviate the fault of others." *Id.* at 752, 756. In *Quinn*, the court required the agency to provide a hearing for an individual who contended that he "did not to any extent participate in the management of the company's affairs" and "was totally without power to do so." *Id.* at 753. Similarly, in *Minotto* v. *United States Dep't of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983), the court required an "actual,

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373 F.2d 110 (2d Cir.), cert. denied, 389 U.S. 835 (1967) (automatic disqualification); *Birkenfield* v. *United States*, 369 F.2d 491 (3d Cir. 1966) (same).

significant nexus with the violating company" and held that a person who was "essentially a clerical employee" was not subject to disqualification under the Act. *Id.* at 409.

Here, petitioners were given the evidentiary hearing required in *Quinn*.[3] The presiding officer thoroughly discussed the testimony of petitioners' witnesses, and he concluded that petitioners did, as a factual matter, exercise significant authority within Yankee Brokerage. See pages 2-3, *supra*. There can be no doubt that the court of appeals was correct in determining that substantial evidence supports the agency's orders. See, *e.g., American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 522-523 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). Review by this Court of such a factbound decision is obviously unwarranted. See, *e.g., Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 507 (1978), quoting *Universal Camera Corp.*, 340 U.S. at 491 (" 'This Court will intervene only in * * * the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied.' ").

b. In any event, the statute surely contemplates that any person within the definition of "responsibly connected" in 7 U.S.C. 499a(9) be subject to the disqualification provisions of 7 U.S.C. 499h(b). See *Pupillo* v. *United States*, 755 F.2d at 643-644; *Zwick* v. *Freeman*, 373 F.2d 110, 119 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *Birkenfield* v. *United States*, 369 F.2d 491, 494-495 (3d Cir. 1966). The plain language of the statute makes the disqualification automatic—it does not require a hearing or other case-by-case inquiry into degree of fault. The definition of

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[3]Indeed, regulations promulgated following the decision in *Quinn* require such a hearing on request of the individual involved or if the presiding officer determines that one is necessary. 7 C.F.R. 47.49(f); see *Minotto*, 711 F.2d at 407 n.3.

"responsibly connected" does not establish an evidentiary presumption, rebuttable or otherwise, for there is no indication that Congress was in fact concerned with individualized notions of actual fault. Cf. *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 18; *United States* v. *Park*, 421 U.S. 658, 670-671 (1975). Indeed, the legislative history shows precisely the opposite. See *Pupillo*, 755 F.2d at 643. Finally, the "obviously rational relationship between officership [or directorship] in a corporation and responsible connection with the corporation" (*Quinn*, 510 F.2d at 756 n.85), combined with the voluntary nature of an individual's decision to accept and continue holding such a position with a regulated entity (see *Birkenfield*, 369 F.2d at 494-495), amply support the constitutionality of the civil sanction established by the Act.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1986

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[4]In any event, petitioners have waived their constitutional objection by failing to present it below. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).